



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

March 17, 1998

Ms. Linda Wiegman
Supervising Attorney
Office of General Counsel
Texas Department of Health
1100 West 49th Street
Austin, Texas 78756-3199

OR98-0733

Dear Ms. Wiegman:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 113223.

The Texas Department of Health (the "department") submitted to this office requests for information from two requestors seeking information regarding complaint reports pertaining to Wilson N. Jones Memorial Hospital. The department submitted to this office documents responsive to these requests, although not in a timely manner. You assert that some of the information at issue is excepted from required public disclosure pursuant to section 552.101 of the Government Code in conjunction with various statutory provisions and common-law privacy.

We note initially that the Open Records Act imposes a duty on governmental bodies seeking an open records decision to submit the request for a decision to the attorney general within ten business days after the governmental body's receipt of the request for information. Gov't Code § 552.301. This time limitation is an express legislative recognition of the importance of having public information produced in a timely fashion. *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.--Austin 1990, no writ). When a request for an open records decision is not made timely, the requested information is presumed to be public. *See* Gov't Code § 552.302. However, this presumption of openness can be overcome by a compelling demonstration that the information should not be made public, such as by a showing that the information is made confidential by law. Open Records Decision No. 150 (1977). The department did not timely seek a decision from this office concerning these requests, but you assert that the information at issue is confidential by law. However, we agree that in some cases you have shown a compelling reason to overcome the presumption that the requested information is public because most of the exceptions you assert require that information be kept confidential.

Furthermore, not all of the exceptions you assert overcome the presumption that the information is public. You have marked information that you assert is protected from public disclosure pursuant to the "informer's privilege" as incorporated into section 552.101 of the Government Code. The informer's privilege aspect of section 552.101 allows the governmental body to withhold the identity of persons who report violations of the law to officials responsible for enforcing those laws. Although the privilege ordinarily applies to the efforts of law enforcement agencies, it can apply to administrative officials with a duty of enforcing particular laws. Attorney General Opinion MW-575 (1982); Open Records Decision Nos. 285 (1981), 279 (1981); *see also* Open Records Decision No. 208 (1978).

In Open Records Decision No. 549 (1990) at 5, this office recognized that by protecting the informer's identity, the privilege protects the governmental body's interest in encouraging the flow of information to the government. Because this privilege exists to protect the governmental body's interest, it may be waived by the governmental body if the governmental body fails to timely seek a decision from this office. *Id.* at 6 (informer's privilege is waivable, whereas privacy rights of a third party are not). Because the department did not timely assert the informer's privilege, the information for which you assert the informer's privilege is public and may not be withheld from disclosure. Gov't Code § 552.302.

Some of the information you marked as confidential is information that is made public by statute. You submitted to this office statements of deficiencies and plans of correction on federal Form HCFA 2567. In accordance with federal regulations, the department must release the federal forms in their *entirety* provided that (1) no information identifying individual patients, physicians, other medical practitioners, or other individuals is disclosed, and (2) the provider whose performance is being evaluated has had a reasonable opportunity to review the report and to offer comments. *See* 42 C.F.R. §§ 401.126, .133; Open Records Decision No. 487 (1988) at 5. You have marked information on these forms as being protected under common-law privacy and various other statutes. However, because federal law clearly provides for these forms to be released in their entirety once they have been de-identified and there has been an opportunity for the provider to review and comment on the information, none of the marked information may be withheld. *Id.* Thus, the department must make these federal forms public in compliance with federal law.

We have reviewed the other documents at issue and agree that some of the information at issue is made confidential by statute or common-law. Thus, you have shown a compelling reason to overcome the Government Code section 552.302 presumption that all of the information at issue is public. We address each of the confidentiality provisions that are applicable to the information at issue.

You submitted to this office State of Texas forms of statements of deficiencies and plans of correction. You have marked information on these forms as being protected under common-law privacy. Because the state forms at issue do not contain any personally identifying information, release of these forms does not implicate common-law privacy.

You have redacted other records to withhold identifying information about patients on the basis of common-law privacy.

Information must be withheld from public disclosure on the basis of privacy when the information is (1) highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The type of information the supreme court considered intimate and embarrassing in *Industrial Foundation* included information such as that relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. In Open Records Decision No. 262 (1980), this office stated that information about a patient's injury or illness might be protected under common-law privacy if such injury or illness relates to drug overdoses, acute alcohol intoxication, gynecological or obstetrical illnesses, convulsions and seizures, or emotional and mental distress. *See also* Open Records Decision No. 539 (1990) at 5 (information concerning emotional state may be protected by common-law privacy). Although we agree that, based on the types of illness, treatment, and symptoms revealed, some of the provided records must be de-identified on the basis of common-law privacy, those markings are co-extensive with those from the various statutes invoked.

However, not all of the records at issue implicate the common-law privacy of patients or other private individuals. Additionally, some of the patients whose names you have redacted on the basis of common-law privacy are deceased. An individual's right of common-law privacy is a personal right that does not extend past that individual's own death. Attorney General Opinion H-917 (1976); Open Records Decision No. 272 (1981) at 1. When the patient's right of privacy is the only privacy interest at stake, and that patient is deceased, the information at issue is not protected from disclosure.

Section 552.101 of the Government Code also excepts from disclosure information that is made confidential by statute. Section 5.08 of V.T.C.S. article 4495b, the Medical Practice Act (the "MPA"), provides:

(b) Records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician are confidential and privileged and may not be disclosed except as provided in this section.

(c) Any person who receives information from confidential communications or records as described in this section other than the persons listed in Subsection (h) of this section who are acting on the patient's behalf may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Section 5.08(j)(3) requires that any subsequent release of medical records be consistent with the purposes for which a governmental body obtained the records. Open Records Decision No. 565 (1990) at 7. Thus, access to the medical records at issue is not governed by chapter 552 of the Government Code, but rather provisions of the MPA. Open Records Decision No. 598 (1991). Information that is subject to the MPA includes both medical records and information obtained from those medical records. *See* V.T.C.S. art. 4495b § 5.08(a), (b), (c), (j); Open Records Decision No. 598 (1991).

Additionally, we observe that the applicability of the Medical Practice Act depends upon whether the records in question come within the language of subsections (a) and (b) of section 5.08 of that act. Hospital treatment is routinely conducted under the supervision of physicians. Since the file is the result of a hospital stay, all the documents relating to diagnosis and treatment would constitute physician-patient communications or “[r]ecords of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician.” Such records are confidential pursuant to section 5.08 of the Medical Practice Act, V.T.C.S. art. 4495b, and are, thus, “deemed confidential” by statutory law. Open Records Decision No. 546 (1990).

Thus, unless the access provisions of the MPA provide for release of the records, both the medical records and the information in other records that was obtained from the medical records, is confidential. We have marked information that may be withheld.

You contend that some of the records at issue are confidential under chapter 611 of the Health and Safety Code, which provides for the confidentiality of records created or maintained by a mental health professional. Section 611.002(a) reads as follows:

Communications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.

Section 611.001 defines a “professional” as (1) a person authorized to practice medicine, (2) a person licensed or certified by the state to diagnose, evaluate or treat mental or emotional conditions or disorders, or (3) a person the patient reasonably believes is authorized, licensed, or certified. Sections 611.004 and 611.0045 provide for access to mental health records only by certain individuals. *See* Open Records Decision No. 565 (1990). We agree that these types of records are confidential unless released in compliance with sections 611.004 and 611.0045. We have marked the information that is protected under section 611.¹

¹Although you raise section 161.032(a) of the Health and Safety Code, we did not locate such records in the documents submitted to this office.

Both section 5.06 of V.T.C.S. article 4495b, and 161.032(a) of the Health and Safety Code contain provisions making certain types of information confidential. Section 5.06(g) states that, "except as otherwise provided by this Act, all proceedings and records of a medical peer review committee are confidential, and all communications made to a medical peer review committee are privileged."

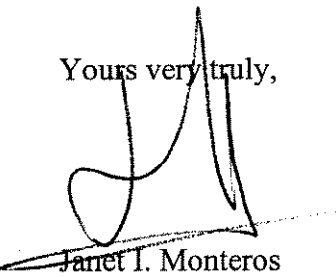
You also assert that some of the information at issue is excepted from disclosure pursuant to section 48.101 of the Human Resources Code. Section 48.101(a) makes the following information confidential:

- (1) a report of abuse, neglect, or exploitation made under this chapter
- (2) the identity of the person making the report; and
- (3) except as provided by this section, all files, reports, records, communications, and working papers used or developed in an investigation made under this chapter or in providing services as a result of an investigation.

We agree that some of the submitted information is made confidential in its entirety under section 48.101(a) of the Human Resources Code, and have marked the documents that may be withheld under this statute.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Janet I. Monteros
Assistant Attorney General
Open Records Division

JIM/glg

Ref.: ID# 113223

Enclosures: Marked documents

cc: Mr. Shain Chapman
124 South Crockett
Sherman, Texas 75091

Ms. Cynthia Minchillo
Kyle & Mathis, L.L.P.
8214 Westchester Dr., Suite 905
Dallas, Texas 75225